U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 14 December 2006

BALCA Case No.: **2006-INA-00036**
ETA Case No.: P2003-CA-09542356/JS

In the Matter of:

FRANCO COLUMBU PRODUCTIONS, INC.,
(formerly known as WESTAR ENTERTAINMENT, INC.),
Employer,

on behalf of

ANNA ROMA,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearance: Wafa J. Hoballah, LLM
Los Angeles, California
For the Employer and the Alien

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").[1] We base our decision on the record upon

[1] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal

which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 13, 2001, Westar Entertainment, Inc. ("Employer") filed an application for labor certification to enable Anna Roma ("Alien") to fill the position of "Administrative Assistant." (AF 195). The Employer required a high school education and three years of experience in the job offered. (AF 195, at Item 14). By letter dated April 16, 2003, the Employer wrote to the CO reporting that it had changed its name from Westar Entertainment, Inc. to Franco Columbu Productions, Inc. (AF 197, 198).

On May 9, 2005, the CO issued a Notice of Findings ("NOF") proposing to deny certification on a variety of grounds. (AF 186-193). As relevant to this appeal, the CO found that the requirement of three years of experience in the job offered was not the Employer's actual minimum requirements for the labor certification position because the Form ETA 750B indicated that the Alien received her qualifying experience while working in Italy for the same Employer, or a different division of the same company. (AF 188). The CO informed the Employer that it must "delete these requirements and retest the labor market, or document why it is not feasible to hire anyone with less than this requirement, or document that the alien's experience was gained through a dissimilar occupation, or document that the alien obtained the required experience or training elsewhere." (AF 188) (emphasis added). The CO also informed the Employer that if it wished to retain the requirement it "must provide convincing justification that it is not now feasible to hire anyone with less than this requirement; or the employer must document that the occupation in which the alien was hired is dissimilar from the occupation for which the employer is seeking labor certification, or document that the alien obtained the experience elsewhere." (AF 189).

The Employer filed its rebuttal by letter dated July 2, 2005. (AF 19-182). The

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Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

Employer stated that, in regard to the actual minimum requirements citation, it "elected to delete certain requirements and retest the labor market." (AF 19). In this regard, the Employer stated that it was attaching a revised Form ETA 750A, a draft advertisement, and a draft notice for posting at the workplace. (AF 20). The attached ETA 750A, draft advertisement and draft notice all contained a two year experience requirement. (AF 23, 25, 26).

The CO issued a Final Determination denying certification on August 18, 2005. (AF 7-8). The CO observed that the Employer failed to eliminate the experience requirement, and only reduced it from three years to two years. The CO also observed that the Employer had not documented that the Alien had gained her experience prior to working with the Employer. Thus, the CO found that the Employer remained in violation of 20 C.F.R. § 656.21(b)(5).[2]

The Employer filed a Request for Review with the Board of Alien Labor Certification Appeals ("BALCA" or "Board") on September 9, 2005. (AF 4-6). The Employer filed a "revised" request on September 19, 2005. (AF 1-3) In both requests, the Employer's position was that it can establish that the CO's conclusion that the Alien had gained her experience with the same Employer was in error, and that it would support this position through briefing.

The Board received the Employer's appellate brief on April 11, 2006. In this brief the Employer does not attempt to establish that the CO's conclusion that the Alien had gained her experience with the same Employer was in error, but rather makes the argument that the NOF gave the Employer inadequate instructions on how to rebut the finding.

[2] The Final Determination also was based on a failure of the Employer "to submit amendment showing which requirements are being deleted." Based on the disposition below, however, we have not reached the question of whether this is also a valid ground for denial of certification.

DISCUSSION

The regulation at 20 C.F.R. § 656.21(b)(5) provides:

> The employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

Section 656.21(b)(5) addresses the situation of an employer requiring more stringent qualifications of a U.S. worker than it requires of the alien; the employer is not allowed to treat the alien more favorably than it would a U.S. worker. *ERF Inc., d/b/a Bayside Motor Inn*, 1989-INA-105 (Feb. 14, 1990). If it appears that the alien gained qualifying experience or training solely with the sponsoring employer, that employer may avoid the proscriptions of section 656.21(b)(6) by proving that the alien was qualified when hired for the position as the result of either experience gained with a different employer, *Salad Bowl Restaurant t/a Ayhan Brothers Food, Inc.*, 1990-INA-200 (May 23, 1991), or experience gained with the same employer but in a different position. *Brent-Wood Products, Inc.*, 1988-INA-259 (Feb. 28, 1989) (*en banc*). Alternatively an employer can establish that it is not presently feasible to hire workers with less training or experience than that required by the job offer.

In the instant case, the Employer in rebuttal did not attempt to establish that the Alien had the qualifying experience prior to hire or gained it in a different position. Nor did it attempt to establish infeasibility of training. Rather, it proffered that it would delete certain requirements and retest the labor market. In its amended ETA 750A, draft advertisement and draft notice, however, it did not delete the experience requirement, but only reduced it from three years to two years.

On appeal, the Employer argues that the NOF failed to adequately advise it that

"deletion of the restriction accompanied by a revised or amended experience requirement of two years must be accompanied by an explanation regarding the alien beneficiary's previous experience [and that such failure] is violative of employer's fundamental right to due process." (Employer Brief at 5). Specifically, the Employer noted that the rebuttal instructions were written in the disjunctive – delete the restrictive requirement and readvertise – or – document why it is not feasible to hire anyone with less than the requirement – or – document that the Alien's experience was through a dissimilar occupation – or – document that the Alien obtained the required experience or training elsewhere. (Employer's brief at 4).

The Board has recognized that when the Employer's rebuttal was deficient because the NOF was misleading, grounds exist for vacating a Final Determination denying certification. *Miaofu Cao*, 1994-INA-53 (Mar. 14, 1996) (en banc). However, in this case we do not find that the NOF was misleading. The relevant portion of the NOF contained two sets of directions depending on whether the Employer's rebuttal was to be based on deletion of the requirement, or whether it was to be based on retention of the requirement. Where the rebuttal was to be based on retention of the requirement, it was quite clear that the Employer would have to address the issue of the Alien's qualifying experience having been gained solely with the Employer, or to establish present infeasibility to train. The Employer's appellate brief appears to be attempting to characterize the reduction of the experience requirement as a deletion of the requirement. But plainly it was only a reduction of the requirement – in effect a partial retention of the requirement. The NOF was not misleading and the Employer's reduction of only part of the experience requirement failed to provide an effective rebuttal. Regardless of whether the requirement was to be three or two years, it was not the Employer's actual minimum requirement because it hired the Alien with no such prior experience. The CO properly denied certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.